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Submission to the Attorney-General's Department on the *Strategic Framework for Access to Justice in the Federal Civil Justice System*

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Submission to the Attorney-General's Department on the Strategic Framework for Access to Justice in the Federal Civil Justice System

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1. Executive Summary and Recommendations

1. The Public Interest Law Clearing House (Vic) Inc (**PILCH**) welcomes the opportunity to make a submission to the Attorney-General's Department in relation to the report of the Access to Justice Taskforce (**Taskforce**) on *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (**Report**).[1] PILCH commends the Attorney-General on his initiative to establish the Taskforce and thanks the Taskforce for its Report.

2. PILCH believes that equitable access to the legal system is central to the effective protection and promotion of human rights in Australia, including the rights to a fair hearing, to equality of and before the law, and to access justice. As the Attorney-General has explained, 'unless justice is accessible, respect for the rule of law is diminished and the integrity of our justice system is compromised'. Access to justice, he explained, 'helps guarantee sound democratic governance and promotes social stability … [it] is a basic human right and is central to the rule of law'. The Attorney-General has also described the importance of 'ensuring that all our citizens can access the justice system, regardless of their particular circumstances'[2]. PILCH strongly endorses these views, and submits that an individual's access to the legal system and to justice, more generally, should not be prejudiced by reason of their inability to obtain adequate information about the law or legal system, or to afford the cost of legal advice.

3. The Australian Government is obligated, under international and domestic human rights law, to ensure access to justice for everyone, everywhere, everyday.[3] Yet, in PILCH's experience and observation, equitable access to justice is not realised in practice in Australia. For example, the cost of delivering and achieving justice is becoming increasingly high, placing it beyond the reach of individuals, particularly the marginalised and disadvantaged. The UN Human Rights Committee recently noted its concern regarding Australia's failure to ensure adequate access to justice for marginalised and disadvantaged groups'. In so doing, it urged the Federal Government to 'take effective measures to ensure equality in access to justice, by providing adequate services to assist marginalized and disadvantaged people, including indigenous people and aliens'[4].

4. Applying a human rights approach to access to justice, PILCH makes the following recommendations regarding the Taskforce's Report:

[1] Access to Justice Taskforce, Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009).

[2] The Hon Robert McClelland MP, 'Remarks at the Queensland Law Society Symposium' (speech delivered at the Convention Centre, Brisbane, 28 March 2009).

[3] See, eg, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976 and for Australia 13 August 1980), arts 14-16; *Charter of Human Rights and Responsibilities Act 2006* (Vic), ss 8, 24.

[4] See HRC, *Concluding Observations: Australia*, UN Doc. CCPR/C/AUS/CO/5 (2009), at para 25.

Recommendation No. 1:
The Federal Government should adopt a socially inclusive legal service delivery model for access to justice in the federal civil justice system.

Recommendation No. 2:
The Federal Government should ensure that addressing the underlying determinants of justice, such as health, housing and education, are a central part of its strategy to improve access to justice in the federal civil justice system.

Recommendation No. 3:
The Federal Government should:

- adopt a socially inclusive legal service triage system for the provision of legal information and legal referrals; and,
- provide adequate funding to support a triage system and the relevant legal and non-legal assistance providers involved in that system.

Recommendation No. 4:
The Federal Government should:

- provide ongoing funding for a comprehensive data collection system. Critically, the provision of such funding must not result in a reduction in funding for core legal service delivery in Australia; and,
- ensure that the data collected is analysed for recurring obstacles to access to justice and insights into how those obstacles can be overcome or alleviated.

Recommendation No. 5:
The federal, state and territory governments should amend relevant legislation to require industry codes of conduct to include appropriate dispute resolution mechanisms.

Recommendation No. 6:
The Taskforce should take the National Alternative Dispute Resolution Advisory Council's findings into account as it revises the Access to Justice Framework.

Recommendation No. 7:
The Federal Government should ensure that alternative dispute resolution is not made compulsory, particularly in cases where there are power imbalances between the parties.

Recommendation No. 8:
The Taskforce should take the report of the Australian Institute of Family Studies into account as it revises the Access to Justice Framework.

Recommendation No. 9:
The Federal Government and Australian courts should work closely with pro bono organisations such as PILCH and, where appropriate, ensure that self-represented litigants are referred to those organisations for legal assistance.

Recommendation No. 10:
The Federal Government should provide financial and other support to initiatives such as the self-represented litigants clinic operated by the Queensland Public Interest Law Clearing House.

Recommendation No. 11:
The Federal Government should work together with state and territory governments to establish and adequately fund Self-Represented Litigants Coordinator programs, similar to that in the Supreme Court of Victoria, in key courts in all Australian jurisdictions.

Recommendation No. 12:
The Federal Government should work together with state and territory governments to require Self-Represented Litigants Coordinators record disaggregated data on self-represented litigants.

Recommendation No. 13:
The Federal Government should work together with state and territory governments to provide additional funding to courts (specifically, Self-Represented Litigants Coordinators) to prepare, publish and deliver training and educational material for judicial officers on best practice management of self-represented litigants.

Recommendation No. 14:
The Federal Government should establish a scheme for funding disbursements in all jurisdictions in matters where the applicant is represented pro bono.

Recommendation No. 15:
The disbursements funding scheme should:
- stipulate that eligibility for assistance extends to 'public interest cases';
- waive application fees in cases of financial hardship and in 'public interest cases'; and,
- grant funding retrospectively in situations where disbursements were incurred urgently or where there is some other compelling reason.

Recommendation No. 16:
The Federal Government should encourage and facilitate the provision of pro bono legal services by:
- reinforcing and strengthening pro bono targets in government legal services contracts and tendering;
- enacting legislation that abrogates the indemnity principle, to the extent necessary, to ensure that litigation costs can be awarded and recovered in pro bono cases;
- addressing barriers to pro bono legal service delivery that are entrenched in State regime government practising certificates and professional indemnity insurance;
- supporting organisations, such as PILCH, which promote and facilitate pro bono legal assistance; and,
- establishing a scheme to enable and encourage the participation of government lawyers in pro bono.

Recommendation No. 17:
Courts should be specifically empowered to make protective costs orders, through an amendment to the courts' relevant empowering legislation.

Recommendation No. 18:
The Federal Government should introduce legislation that would discourage the use of strategic litigation against public participation writs and encourage public participation.

Recommendation No. 19:
Commonwealth departments should pay the legal fees applicable to corporations.

Recommendation No. 20:
The Standing Committee of Attorney Generals should examine the tax deductibility of legal costs.

Recommendation No. 21:
Pro bono parties should be entitled to declare and recover the effective cost of pro bono contributions under the proposed litigation budget disclosure scheme.

Recommendation No. 22:
The Federal Government should adopt the Taskforce's recommendation to establish a national co-ordination group to facilitate strategic decision-making across the legal assistance system. This group should engage in information sharing and consultation with equivalent state and territory groups.

Recommendation No. 23:
The Federal Government should adopt the Taskforce's recommendation to prioritise prevention and early intervention services.

Recommendation No. 24:
The Federal Government should:
- increase legal aid funding, particularly for civil, family and migration matters;
- broaden legal aid guidelines;
- establish a national civil legal aid scheme;
- introduce a national means test for civil aid that is less restrictive than the current Victorian regime; and,
- remove restrictions on federal legal aid funding so that it is made available in state and territory legal aid matters.

Recommendation No. 25:
The Federal Government should increase the core funding of community legal centres.

Recommendation No. 26:
The Federal Government should expand the Duty Lawyer scheme to all courts and ensure adequate funding for its effective operation.

Recommendation No. 27:
The Federal Government should improve access to legal assistance in RRR areas, including by examining the feasibility of:
- increasing legal aid funding for more outreach services in RRR areas;
- increasing funding for wages for community legal centres in RRR areas;
- providing HECs assistance to law graduates as an incentive to practice outside the metropolitan area; and,
- examining ways to support pro bono work being undertaken in these areas.

2. About PILCH

5. PILCH is a leading Victorian, not-for-profit organisation that is committed to furthering the public interest, improving access to justice and protecting human rights. It coordinates the delivery of pro bono legal services through four pro bono referral schemes (Public Interest Law Scheme, Victorian Bar Legal Assistance Scheme, Law Institute of Victoria Legal Assistance Scheme and PilchConnect) and two pro bono outreach legal clinics (Homeless Persons' Legal Clinic and Seniors Rights Legal Clinic), and undertakes law reform, policy work and community legal education.

6. PILCH's objectives are to:

   - improve access to justice and the legal system for those who are disadvantaged or marginalised;
   - identify and seek to redress matters of public interest requiring legal assistance for those who are disadvantaged or marginalised;

- refer individuals, community groups, and not for profit organisations to lawyers in private practice, and to others in ancillary or related fields, who are willing to provide their services without charge;
- support community organisations to pursue the interests of the communities they seek to represent; and,
- encourage, foster and support the work and expertise of the legal profession in pro bono and public interest law.

PILCH seeks to meet these objectives by facilitating the provision of pro bono legal services and by undertaking law reform, policy work and legal education.

7. In 2007-2008, PILCH facilitated pro bono assistance for over 2,000 individuals and organisations and provided hundreds of others with legal information and referrals. PILCH also encouraged and promoted pro bono work amongst Victorian lawyers, not just within private law firms but also those working in government and corporate legal departments. In the last year, PILCH also made numerous law reform submissions on questions of public interest. Much of this work assisted in securing human rights and access to justice for marginalised and disadvantaged members of the Australian community.

8. PILCH has a particular interest in ensuring access to justice. To this end, it has facilitated numerous pro bono referrals and made countless policy and law reform submissions that aim to realise these important goals. For example, in April 2009, PILCH made a submission to the Senate Standing Committee on Legal and Constitutional Affairs on its inquiry into access to justice.[5] The present submission is made in the context of PILCH's efforts to facilitate access to justice for marginalised and disadvantaged individuals and groups.

3. Scope and Structure of Submission

9. This submission examines and responds to the recommendations set out in the Access to Justice Taskforce's Report. The submission does not address all of the Taskforce's recommendations, but rather those that relate to areas in which PILCH has particular expertise and experience.

10. PILCH's submission should be read in conjunction with its submission to the Senate Standing Committee on Legal and Constitutional Affairs on its inquiry into access to justice. Many of the issues considered in the Taskforce's Report are addressed in detail in that submission (**see Annexure 1**).

11. This submission begins in section 4 by examining the access to justice framework in Chapter 5 of the Taskforce's Report. Section 5 of the submission examines the non-court models of dispute resolution considered in Chapter 7 of the Taskforce's Report, highlighting models of dispute resolution in need of reform. It focuses on internal and external resolution of consumer disputes as well as Alternative Dispute Resolution (**ADR**), including family dispute resolution services. Section 6 considers court-based dispute resolution, discussed in

[5] See Chris Povey *et al*., *Submission to the Senate Legal and Constitutional Affairs Committee on the Inquiry into Access to Justice* (PILCH, 2009), at 20, available at: www.pilch.orga.au/2009_submissions.

Chapter 8 of the Taskforce's Report, focusing on: access to justice for self-represented litigants (**SRLs**); the significance of, and obstacles to, public interest litigation; and, litigants who impose disproportionate costs on the justice system. In section 7, the submission examines recovery of legal costs and the need for transparency in legal fees. Last, section 8 responds to Chapter 11 of the Taskforce's Report on legal assistance. It considers the proposal for national coordination of legal assistance services, the importance of early intervention in legal matters, the delivery of legal services by legal aids commissions (**LACs**) and duty lawyers, and the provision of legal assistance in regional, rural and remote (**RRR**) areas.

4. Access to Justice Framework

4.1 Access to Justice Principles

12. In the foreword to the Taskforce's Report, the Attorney-General rightly states that '[a]ccessibility is about more than ease of access to sandstone buildings or getting legal advice. It involves an appreciation and understanding of the *needs* of those who require the assistance of the legal system'[6]. In PILCH's experience, it is often the *needs* of the most vulnerable that are marginalised and misunderstood, which exacerbates the injustices that they experience on a daily basis.

13. PILCH welcomes the identification in the Taskforce's Report of the needs of the marginalised and disadvantaged. However, it is concerned that the Report fails to address and examine the real 'beta-blockers' to access to justice. Put simply, despite recognising that

> [a]ccess to justice is not only about accessing institutions to enforce rights or resolve disputes but also about having the means to improve 'everyday justice'; the justice quality of people's social, civic and economic relations,[7]

the Taskforce's Report fails to comprehend and grapple with the day-to-day obstacles and injustices that the marginalised and disadvantage face, including inadequate housing and an inability to access healthcare. A woman who sleeps rough, for instance, is unlikely to seek legal assistance for domestic violence if she is preoccupied with finding a safe and secure place for her and her children to sleep.

14. As this example demonstrates, access to justice needs to be conceptualised in a holistic way, one that emphasises access to the legal system as well as the underlying determinants of justice, such as access to adequate housing, health care, education and employment. As noted in the Report, it requires a 'whole of system examination'[8].

15. PILCH strongly urges the Federal Government to adopt this holistic approach and commit to a socially inclusive access to justice model. In practical terms this requires the

[6] Access to Justice Taskforce Report, above note 1, at ix [emphasis added].

[7] Ibid at 4.

[8] Ibid, at 5.

Government to ensure that the underlying determinants of justice are met. If the Government fails to ensure that these determinants are met, it will not be possible to realise the goal of effective access to justice (no matter how accessible the justice system is). Failure to ensure that the underlying determinants of justice are met will, in addition, create further obstacles to access to justice.

16. The Taskforce accurately states that '[t]he justice system should have the capacity to direct attention to the real causes of problems that may manifest as legal issues'[9]. PILCH contends that this objective will only succeed through the adoption of a socially inclusive legal service delivery model. As advocated by the National Association of Community Legal Centres,[10] this model embraces principles of self-empowerment, holistic service delivery, community development, and stakeholder partnerships. PILCH believes that failing the adoption of this model, any improvements to the justice system will be superficial and will not have an expansive and/or enduring impact.

Recommendation No. 1:
The Federal Government should adopt a socially inclusive legal service delivery model for access to justice in the federal civil justice system.

Recommendation No. 2:
The Federal Government should ensure that addressing the underlying determinants of justice, such as health, housing and education, are a central part of its strategy to improve access to justice in the federal civil justice system.

4.2 Access to Justice Methodology

17. In its Report, the Taskforce rightly points out that the '[p]rovision of information about the law or legal rights, including services and benefits, is a central means of influencing access to justice' and further that '[e]arly intervention will prevent legal problems from occurring and escalating'[11]. In PILCH's view, there is a critical gap in the availability of legal information and advice, particularly in civil law areas, for those who cannot afford to pay for legal services. The difficulties in obtaining legal information and advice are compounded for disadvantaged groups, such as those with a mental illness or persons from culturally and linguistically diverse communities.

18. PILCH endorses the Taskforce's view that early intervention is paramount, both in terms of the provision of legal information and legal advice. PILCH supports the adoption of a 'triage' structure that enables matters to be directed to the most appropriate service for information and advice, irrespective of how people make contact with the legal system. A triage structure will, however, only succeed if it and the legal assistance providers are adequately resourced and funded. Failing this key Government commitment, the triage

[9] Ibid at 62.

[10] See generally National Association of Community Legal Centres, *Community Legal Centres: Putting Social Inclusion into Practice* (2009).

[11] Access to Justice Taskforce Report, above note 1, at 63.

structure will merely add another level of frustration experienced by individuals already lost in the legal justice system.

19. The Taskforce's Report illustrates the benefits of a triage system by using a debt recovery case study.[12] In the absence of early legal assistance the first diagram suggests that an individual will present to court with little or no legal assistance and will most likely receive an unfavourable outcome. PILCH has witnessed firsthand the devastating effects of debt recovery and bankruptcy litigation on an individual and their life. It is PILCH's experience that LACs do not fund these matters and Community Legal Centres (**CLCs**) have limited capacity to assist individuals with complex legal and non-legal claims. PILCH therefore submits that the adoption of a triage pathway, in diagram two, will have limited impact unless the legal and allied support assistance supports are adequately funded.

Recommendation No. 3:
The Federal Government should:

- adopt a socially inclusive legal service triage system for the provision of legal information and legal referrals; and,
- provide adequate funding to support a triage system and the relevant legal and non-legal assistance providers involved in that system.

4.3 Statistics on the Justice System

20. The Taskforce reports that '[a]ccess to justice related inquiries over several years have consistently indicated that insufficient statistical data is available to make comprehensive decisions about access to justice'[13]. As the key provider of pro bono referral services in Victoria, PILCH is well placed to identify gaps in the availability of legal services and barriers in accessing the justice system. For example, following significant funding cuts at Victoria Legal Aid, including in the area of family law,[14] the Law Institute of Victoria Legal Assistance Scheme (one of the pro bono legal assistance schemes housed at PILCH) recorded an increase in inquiries from 73 to 128 between financial years 2007-08 to 2008-09.[15] During the same period, the Victorian Bar Legal Assistance Scheme (another pro bono scheme at PILCH) noted an increase in inquiries from 40 to 73 and an increase in referrals from 8 to 23. What these statistics show is a direct correlation between funding cuts to legal aid and an increase in unmet legal need.

21. Statistics such as these illustrate the importance of collecting accurate data on the provision of legal assistance in Australia. Perhaps, most importantly, detailed disaggregated data on the provision of legal assistance can provide key insights into the major barriers to accessing justice and the steps required to remove them.

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[12] Ibid at 69.

[13] Ibid at 72.

[14] See Victoria Legal Aid, *Annual Report 2007 – 2008*, at 3. See also Hamish Gilmore, *A New National Policy for Legal Aid* (2008), at 4.

[15] The minor increase in successful referrals during the same period (from 5 to 6) demonstrates the difficulties in referring family law matters for pro bono assistance.

22. Whilst PILCH is well placed to identify gaps in the availability of legal services and barriers in accessing the justice system in Victoria, it does not have the funding or resources to collect detailed disaggregated data or to collect information in other states. PILCH urges the Federal Government to provide ongoing funding for a comprehensive data collection system. In PILCH's view, that system must include a broader commitment to address and improve fundamental access to justice issues, by which is meant that the data collected must be analysed for recurring obstacles to access to justice and insights into how those obstacles can be overcome or alleviated.

Recommendation No. 4:
The Federal Government should:

- provide ongoing funding for a comprehensive data collection system. Critically, the provision of such funding must not result in a reduction in funding for core legal service delivery in Australia; and,
- ensure that the data collected is analysed for recurring obstacles to access to justice and insights into how those obstacles can be overcome or alleviated.

5. Non-Court Models of Dispute Resolution

23. PILCH welcomes the Taskforce's finding that an increase in the early use of non-court models of dispute resolution has significant capacity to improve access to justice. PILCH shares the Taskforce's views that non-court models of dispute resolution help to ensure that: disputes are resolved as early as possible; resolution processes are used that emphasise parties' needs and interests; and, costs are minimised.[16]

5.1 Consumer Disputes

(a) *Internal Dispute Mechanisms*

24. PILCH agrees with the Taskforce that internal complaint resolution is a cheap, quick and effective mechanism for dealing with consumer disputes. In line with the Taskforce's Report, PILCH believes that internal complaint resolution should be encouraged as the first step in resolving consumer disputes.

25. PILCH submits that, in order to guarantee, and assure consumers' perception of, the independence and impartiality of internal dispute mechanisms, it is imperative that they adhere to accepted standards of administrative review. These standards include accessibility, independence, fairness, accountability, efficiency and effectiveness.[17] In PILCH's view, there should be incentives for businesses to ensure that their internal complaints mechanisms adhere to these standards of administrative review.

[16] Access to Justice Taskforce Report, above note 1, at 87.

[17] See Administrative Review Council, *Administrative Accountability in Business Areas Subject to Complex and Specific Regulation*, Report No. 49 (2008), at 39.

26. Regrettably, the Taskforce's Report does not commit to such action, but rather couches its discussion of internal complaints mechanisms in terms of 'encouraging' and 'supporting' business throughout internal dispute processes.[18] PILCH urges the Federal Government to introduce strong incentives that prompt businesses to adopt robust internal complaints mechanisms that comply with accepted standards of administrative review; businesses should not be relied upon to do the right thing by consumers. In addition, PILCH calls on federal, state and territory governments to amend relevant legislation to require industry codes of conduct to include appropriate dispute resolution mechanisms.

(b) *External Dispute Resolution*

27. In its Report, the Taskforce notes that external dispute resolution (**EDR**), meaning a dispute resolution process that is external to the business that is the subject of a dispute, 'can offer cheap and flexible approaches to dispute resolution for business and consumers. EDR gives consumers a responsive complaint and dispute resolution scheme, and there are no costs to the customer if he/she is unsuccessful'[19]. In addition, businesses can benefit 'from continuous improvement to best business practice' and industries can be responsible 'for maintaining their own system and standards of access to justice, encouraging compliance and change in corporate culture'[20].

28. PILCH generally supports the use of EDR schemes to assist consumers in disputes with businesses, provided that they are transparent, accessible, fair, responsive and timely. The international standard, established by the International Organization for Standardization, on how to operate, maintain and improve an effective EDR provides a good practice example that, in PILCH's view, businesses should be required to comply with.[21]

29. Current EDR services, including the Telecommunications Industry Ombudsman and the Financial Ombudsman Service, are appropriate for consumer disputes because they apply consistency in the quality of decisions. Additionally, industry ombudsmen can undertake systemic investigations, to address issues that may affect a large number of consumers, without the need for consumers to lodge individual complaints.

30. However, there are a number of issues with current EDR services in Australia that may compromise consumers' ability to access justice. There may be perceptions of partiality and bias in the governance structures of some of these organisations, and the schemes lack their own external review mechanisms to ensure

[18] Access to Justice Taskforce Report, above note 1, at 92.

[19] Ibid at 88.

[20] Ibid.

[21] See International Organization for Standardization, *Quality Management: Customer Satisfaction-Guidelines for External Customer Dispute Resolution* (2007).

accountability.[22] Similarly, these schemes' terms of reference are typically limited to service, fees and claim disputes, and exclude complaints about product pricing, advertising and governance.[23]

31. There is an inherent tension with industry-operated EDR services. As a result, PILCH contends that federal, state and territory governments should amend relevant legislation to require industry codes of conduct to include appropriate dispute resolution mechanisms. PILCH submits that this is an appropriate standard to be used more widely in EDR services.

5.2 Alternative Dispute Resolution

32. ADR is a core element of access to justice in Australia. For instance, ADR helps to promote less adversarial processes for resolving disputes and early resolution of disputes.[24]

(a) *Report of the National Alternative Dispute Resolution Advisory Council*

33. In its Report, the Taskforce acknowledged that the Attorney-General had asked the National Alternative Dispute Resolution Advisory Council (**NADRAC**) to undertake an inquiry into the use and efficacy of ADR in the Australian justice system. NADRAC's report was publicly launched on 4 November 2009 and PILCH understands that it was not considered by the Taskforce. This important inquiry should inform the Taskforce's consideration of ADR. PILCH urges the Taskforce to take NADRAC's findings into account as it revises the Access to Justice Framework.

34. Whilst PILCH welcomes NADRAC's report, PILCH is concerned that NADRAC recommends the introduction of compulsory pre-filing ADR.[25] In PILCH's experience there are certain circumstances when marginalised and disadvantaged individuals should *not* be required to undertake compulsory ADR, particularly where there are power imbalances between the parties, and one of the parties is vulnerable and/or lacks assistance and information. Rather than enabling such individuals to access justice, compulsory ADR may adversely affect the ability of marginalised and disadvantaged individuals to access justice.

(b) *Family Dispute Resolution Services*

35. As with ADR, PILCH acknowledges that the Taskforce was unable to provide considered comments on the role of FDR, until the Australian Institute of Family Studies (**AIFS**) reports to the Attorney General on the evaluation of the family law reforms. When the AIFS report is completed, it is vital that the Taskforce

[22] See Bill Dee, Simon Smith and John Wood, 'Industry Ombudsman Schemes Twenty Years On: World Benchmark or Industry Captured?' (2009) 34(3) *Alternative Law Journal* 183, at 184-5.

[23] Ibid at 185.

[24] Access to Justice Taskforce Report, above note 1, at 92.

[25] National Alternative Dispute Resolution Advisory Council, *The Resolve to Resolve – Embracing Alternative Dispute Resolution to Improve Access to Justice in the Federal Jurisdiction* (2009), at 24, available at:

considers the AIFS findings. The Taskforce's Report would benefit from incorporating the conclusions of the AIFS report, and extrapolating those conclusions to other forms of dispute, where appropriate.

Recommendation No. 5:
The federal, state and territory governments should amend relevant legislation to require industry codes of conduct to include appropriate dispute resolution mechanisms.

Recommendation No. 6:
The Taskforce should take NADRAC's findings into account as it revises the Access to Justice Framework.

Recommendation No. 7:
The Federal Government should ensure that ADR is not made compulsory, particularly in cases where there are power imbalances between the parties.

Recommendation No. 8:
The Taskforce should take the report of the Australian Institute of Family Studies into account as it revises the Access to Justice Framework.

6. Court-Based Dispute Resolution

6.1 Self-Represented Litigants

36. In its Report, the Taskforce examines access to justice for SRLs and the impact that SRLs can have on the court system as a whole. In so doing, it recommends that

> [t]he courts should develop means by which self-represented litigants' claims could be listed for early evaluation of the merits, and considering whether parties should be referred for external assistance. Courts should be flexible in allowing the filing of revised claims where an applicant is self-represented.[26]

PILCH shares the Taskforce's view that access to justice for SRLs is crucial, both for the individual litigant and the court system, and supports the Taskforce's recommendation.

37. SRLs are often not familiar with the substantive law or the legal system, which places them at a significant disadvantage and drains already overburdened court resources. One authoritative report has explained that SRLs give rise to two broad concerns. 'On the one hand, it places litigants at a disadvantage in presenting their cases and negotiating the court's processes. On the other hand, it has an impact on the efficient administration of the system, because this group of litigants requires a substantial degree of assistance and

http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~NADRAC+The+Resolve+to+Resolve+Report_web.PDF/$file/NADRAC+The+Resolve+to+Resolve+Report_web.PDF.

[26] Access to Justice Taskforce Report, above note 1, at 111.

guidance from the court'[27]. Balancing the rights of SRLs and the need to ensure an efficient justice system is one of the most significant challenges facing the legal system today.[28]

38. Ensuring access to justice is a fundamental obligation of the federal, state and territory governments. Article 24 of the *Charter of Rights and Responsibilities Act* (Vic), for example, outlines the obligation incumbent on public authorities to ensure that individuals enjoy a right to a fair hearing. In *Tomasevic v Travaglini & Anor*, Justice Bell explained:

> Every judge in every trial, both criminal and civil, has an overriding duty to ensure the trial is fair. A fair trial is the only trial a judge can judicially conduct. The duty is inherent in the rule of law and the judicial process. Equality before the law and equal access to justice are fundamental human rights specified in the ICCPR. The proper performance of the duty to ensure a fair trial would also ensure those rights are promoted and respected.
>
> Most self-represented persons lack two qualities that competent lawyers possess - legal skill and ability, and objectivity. Self-represented litigants therefore usually stand in a position of grave disadvantage in legal proceedings of all kinds. Consequently, a judge has a duty to ensure a fair trial by giving self-represented litigants due assistance. Doing so helps to ensure the litigant is treated equally before the law and has equal access to justice.
>
> The matters regarding which the judge must assist a self-represented litigant are not limited, for the judge must give such assistance as is necessary to ensure a fair trial. The proper scope of the assistance depends on the particular litigant and the nature of the case. The touchstones are fairness and balance. The assistance may extend to issues concerning substantive legal rights as well as to issues concerning the procedure that will be followed.[29]

(a) *External Referrals to Pro Bono Legal Services*

39. In line with the Taskforce's recommendation above, PILCH strongly urges the Federal Government and Australian courts to work closely with pro bono organisations, such as PILCH, which are well placed to assess a SRL's matter and, where appropriate, refer that person for pro bono legal assistance.

40. It is PILCH's view that where an individual is a SRL because of circumstance, for example, because they are unable to avoid legal representation, they may benefit from pro bono assistance from a pro bono organisation such as PILCH. Provided that that person satisfies PILCH's eligibility, PILCH may be able to secure pro bono legal assistance for him or her from a member firm. In contrast, PILCH believes that it is inappropriate to divert limited pro bono resources to assist individuals who are SRLs by choice, for example, because, despite having the means to retain their own legal representation, they choose not to.

41. The Federal Government should provide financial and other support to initiatives such as the SRLs clinic operated by the Queensland Public Interest Law Clearing House, which assists eligible SRLs with the conduct of their case. Clinic lawyers

[27] See, eg, Victorian Law Reform Commission, *Civil Justice Review: Report* (2008), 523.

[28] See, eg, *Cachia v Hanes* (1994) 120 ALR 385, at 391.

[29] *Tomasevic v Travaglini & Anor* [2007] VSC 337, at paras. 127-129.

give legal advice, draft court documents, conduct legal research and, for example, suggest other options for resolution of the case. Lawyers also help SRLs to: understand the law, process and procedure; observe court rules and proper process; conduct their case efficiently; be aware of potential orders and the effect of not complying with them; and, present their case in the best light and in the best way.

42. Fostering relationships between the Federal Government, Australian courts and pro bono organisations will improve opportunities for SRLs to access justice and help to alleviate the disproportionate burden of SRLs on courts.

(b) *Court-Based SRLs Coordinators*

43. In 2006, the Supreme Court of Victoria established the role of SRLs Coordinator. The Coordinator is the primary contact for SRLs and provides non-legal advice on, *inter alia*, procedural and practical issues, completing court forms and filing documents.

44. In PILCH's experience, the SRLs Coordinator plays a key role within the Supreme Court, providing important and much needed assistance to SRLs and ensuring the more efficient administration of justice. PILCH has worked closely with the SRLs Coordinator and has regularly received referrals from the Coordinator. As a result of this partnership, PILCH has been able to secure pro bono legal assistance for a number of SRLs, who otherwise may not have been able to secure such assistance. For example, PILCH was able to secure pro bono legal assistance for Mr R, a non-English speaking man, referred by the SRL Coordinator. Mr R was seeking assistance in appealing a decision of the County Court to refuse to stay proceedings because of a requirement in a contractual agreement that arbitration of disputes occur in China. As a result of the assistance secured by PILCH, Mr R. was successful in obtaining a stay of proceedings.

45. PILCH submits that the federal, state and territory governments should work together to establish and adequately fund SRLs Coordinators on an ongoing basis in key courts around Australia. SRLs Coordinators should be responsible for:

- providing procedural assistance to SRLs;
- referring SRLs to pro bono legal assistances, where appropriate;
- maintaining detailed records of the interactions of SRLs with the Australian court system;
- developing plain English information and material to help SRLs to navigate the court system in their respective jurisdictions; and,
- working together with other SRLs Coordinators to develop indicia to measure, where possible, the broader impact that SRL have on the court system.

(c) *Collecting Disaggregated Data on SRLs*

46. Although it is clear that Australian courts have to deal with an ever-increasing number of SRLs,[30] there is limited information and disaggregated data available on the number and types of SRLs appearing before Australian courts, the types of matters in which persons are appearing self-represented, and the outcome of proceedings in which one or both parties were self-represented.

47. Information and disaggregated data is critical to understanding how SRLs interact with the court system and how the federal, state and territory governments can fulfil their human rights obligations to ensure that SRLs can access justice. PILCH urges the federal, state and territory governments to work together to require SRL Coordinators to record information and disaggregated data on their dealings with SRLs. The respective government should then analyse that data, with a view to determining how they might better address the ways in which SRLs interact with the legal system.

(d) *Training for Court Staff on SRLs*

48. As explained above, evidence suggests that Australian courts have to deal with an ever-increasing number of SRLs. Court staff spend considerable time with SRLs explaining court processes and procedures and assisting with completion of court documents. PILCH believes that court staff would benefit from training and educational materials on how best to assist SRLs with: basic legal and procedural information; filling out forms; and, for example, referral to available interpreter and legal services, including Legal Aid, CLCs, and pro bono schemes (such as those administered by PILCH).

49. PILCH submits that the federal, state and territory governments should work together to ensure that mechanisms are put in place to provide court staff ongoing training on how best to assist SRLs.

Recommendation No. 9:
The Federal Government and Australian courts should work closely with pro bono organisations such as PILCH and, where appropriate, ensure that SRLs are referred to those organisations for legal assistance.

Recommendation No. 10:
The Federal Government should provide financial and other support to initiatives such as the SRL clinic operated by the Queensland Public Interest Law Clearing House.

[30] See generally, Victorian Law Reform Commission, above note 27, CH 9.

Recommendation No.11:
The Federal Government should work together with state and territory governments to establish and adequately fund SRL Coordinator programs, similar to that in the Supreme Court of Victoria, in key courts in all Australian jurisdictions.

Recommendation No. 12:
The Federal Government should work together with state and territory governments to require SRL Coordinators record disaggregated data on SRLs.

Recommendation No. 13:
The Federal Government should work together with state and territory governments to provide additional funding to courts (specifically, SRLs Coordinators) to prepare, publish and deliver training and educational material for judicial officers on best practice management of SRL.

6.2 Public Interest Litigation

50. Public interest litigation is an important tool for ensuring access to justice, especially for the marginalised and disadvantaged and in cases involving systemic human rights violations. Nevertheless, the high cost of private legal services, the increasing complexity and specialisation within the law, and the stringent regulation of public interest litigation in Australia means that a substantial proportion of disadvantaged people experience barriers to seeking legal assistance in public interest matters.

51. PILCH considers that there are a number of issues that ought to be addressed by the Taskforce to ensure that public interest litigation is accessible and serves its important purpose of addressing legal matters of broad public interest. These issues include court fee waivers and disbursement funds, costs including disbursements, funding for civil law legal aid, facilitation of pro bono, and litigants imposing disproportionate costs.

(a) *Court fee waivers and disbursement funds*

52. In addition to the need for pro bono legal assistance, many litigants or potential litigants need the assistance of other professionals before they can pursue their legal rights. For instance, litigants may require medical opinions as part of their evidence or a mediator to attempt to settle a litigious dispute. Litigants also face out-of-pocket expenses, such as court and tribunal filing fees, daily sitting fees, interpreters' fees and transcript fees. Even if pro bono legal assistance is available, the costs of these disbursements can be a barrier to accessing the justice system.

53. The current court fee waiver schemes allow for the waiver of most court fees where the party can show financial hardship.

54. Limited disbursement funds which assist litigants in meeting the costs of disbursements in civil litigation also exist in some jurisdictions in Australia. For example, in Victoria, a disbursement fund called Law Aid was established by the

Victorian Government and the private legal profession to assist people with meeting the costs of disbursements in civil litigation where they are unable to afford these costs.

Case Study A: Law Aid Scheme, Victoria

Law Aid was established in 1996 with a seed grant of $1.7 million from the Victorian Government to establish a non-profit charitable trust administered by the Law Institute of Victoria and the Victorian Bar Council. The types of civil litigation funded by Law Aid include personal injuries claims, claims against institutions involving discrimination or oppressive behaviour, some property claims, wills and estates matters and professional negligence claims. Assistance is not available for criminal law or family law matters. Law Aid will provide money to the applicant's solicitor to cover necessary disbursements, such as medical reports.

All applicants pay a non-refundable application fee of $100. Successful litigants pay a fee representing 5.5% of any award they receive and the cost of the disbursements, if they are recovered from the unsuccessful party. Law Aid is self-financing and relies on these payments to sustain the fund.

55. PILCH regularly procures pro bono legal services for persons in matters where the lack of available funding for disbursements creates a significant barrier to progressing the matter and may result in a client not pursuing a meritorious claim, as illustrated in the case studies below. In PILCH's experience, the limited availability of funding for disbursements acts as a disincentive to practitioners providing pro bono legal advice and to litigants pursuing public interest cases.

Case Study B: Disbursement Funding (Criminal Charges)

PILCH referred a matter to a criminal solicitor for assistance to appeal against a sentence for burglary and theft charges and a breach of a five month suspended sentence. The County Court had imposed a 14 month imprisonment term. The client was on bail awaiting appeal. The Court decided to adjourn the matter for three months pending further urine screening samples which would show whether the client was drug free. The client had exhausted the rebate available to him for Medicare for urine samples and he could not afford to pay for further tests. The pro bono solicitor involved asked PILCH to assist in finding a welfare agency or other organisation who could donate money for further urine testing. Law Aid was not available. Without funding for this disbursement, the client faced a significantly longer jail term.

Case Study C: Disbursement Funding (Settlement of Negligence Proceedings)

PILCH referred for pro bono legal assistance a client who was the defendant in proceedings brought by the parents of a child who had been injured on the client's property. It was alleged that the client was responsible in negligence for the child's injuries. The pro bono practitioners obtained a report regarding the cause of the child's injuries. As a result of obtaining the expert report and receiving sound legal advice, the client decided to accept liability rather than defend the matter at trial. The cost of obtaining the expert report, which was significant, was covered by the pro bono practitioner. However, in most cases, a pro bono practitioner would not

be prepared to pay for an expert report, and a case such as this would proceed to trial at considerable cost to the justice system.

Case Study D: Disbursement Funding (Mental Health)
PILCH has received a number of inquiries from persons subject to involuntary treatment orders in psychiatric hospitals who seek legal assistance to challenge their involuntary treatment order. In order to do so it is usually highly desirable to obtain a second opinion from a qualified clinician as to the appropriateness of the order. Frequently, the person is unable to afford the cost of obtaining a second opinion and is advised that his or her legal claim lacks merit without a second opinion. Therefore, the person either decides not to pursue the claim, or is unable to secure pro bono legal assistance on the basis that the claim lacks legal merit.

56. PILCH has also received requests for legal assistance for matters on appeal where tape transcripts of court or tribunal hearings are critical but the client cannot afford to cover the cost of such a disbursement, and Law Aid is not available. In such cases, PILCH is unable to procure pro bono assistance as we are unable to assess the merits of the case without the transcript of the hearing.

57. PILCH considers the right to a fair hearing, and in particular the right to equal access to and equality before the courts, requires that funding for disbursements in litigation be available in all Australian jurisdictions and in a broad range of cases.

58. PILCH considers that a disbursement funding scheme should be extended to apply to 'public interest cases', being cases where the matter raises an issue that requires addressing for the public good, or the applicant is seeking redress in matters of public interest for those who are disadvantaged or marginalised, or the matter raises an issue concerning the human rights of the applicant involved. The matters for which disbursements funding is available should not be confined to civil proceedings, but should also include criminal and family law matters, even where there is a limited or no prospect of the disbursements funding scheme recouping the funding it provides.

59. PILCH also considers that a disbursement funding scheme should have provision for waiver of any application fee in cases where payment of the application fee would cause significant financial hardship or where the matter raises an issue of public interest or human rights.

60. Finally, a disbursements funding scheme should grant funding retrospectively in situations where disbursements were incurred urgently or where there is another compelling reason for funding the disbursements.

Recommendation No. 14:
The Federal Government should establish a scheme for funding disbursements in all jurisdictions in matters where the applicant is represented pro bono.

Recommendation No. 15:
The disbursements funding scheme should:

- stipulate that eligibility for assistance extends to 'public interest cases';
- waive application fees in cases of financial hardship and in 'public interest cases'; and,
- grant funding retrospectively in situations where disbursements were incurred urgently or where there is some other compelling reason.

(b) *Support and encouragement of pro bono*

61. Many litigants or potential litigants require assistance from pro bono lawyers in order to be able to able pursue public interest litigation. PILCH holds the strong view that pro bono is no substitute for an adequately funded Legal Aid and CLC sector. In any event, capacity for pro bono is finite and private law firms are reluctant to undertake legal work on a pro bono basis in areas that are traditionally the domain of Legal Aid or CLCs. Therefore, pro bono can not satisfy the total demand for legal services by those who cannot afford to pay for them.

62. Nevertheless, there are untapped or under-utilised pro bono resources (particularly in the medium-sized law firms) that the Federal Government could seek to engage with to enlarge the pool of pro bono resources to meet the significant unmet need. PILCH considers that the government should take steps to encourage the private profession to undertake pro bono work. There are a number of practical ways of doing this:

(i) *Legal services contracts*

Reinforce and strengthen provisions in government legal services contracts and through tendering requirements, requiring law firms (and other professional service providers) to contribute to pro bono legal assistance.

(ii) *Recovery of costs in pro bono matters*

There is significant uncertainty in the law as to the circumstances in which the courts may award costs to a successful party in litigation where that party is represented on a pro bono basis. At present, the court's ability to make a costs order in such cases, and the ability of a pro bono litigant to actually recover costs under such an order, appears to depend upon the proper interpretation of the relevant pro bono retainer and, in particular, the terms of any conditional costs agreement. PILCH believes that greater certainty is required – for both pro bono litigants and pro bono lawyers – and that greater certainty is likely to encourage more lawyers to participate in pro bono schemes, including those co-ordinated by PILCH.

PILCH proposes that this can be achieved by the abrogation of the indemnity principle in pro bono cases, through uniform amendments to the state and territory *Legal Profession Acts*.

(iii) *Support pro bono facilitators*

The Government should support organisations such as PILCH, which promote and facilitate pro bono legal assistance.

PILCH received 2039 requests for pro bono assistance in 2008 and made 538 referrals to law firms and barristers through its six legal assistance schemes. Private law firms and barristers rely on PILCH to take and filter these inquiries and to co-ordinate referrals to the most appropriate legal service. Importantly, as a CLC and member of the Federation of Community Legal Centres, PILCH has a sophisticated understanding of the access to justice issues for marginalised and disadvantaged people and is well-placed to make assessments of need for pro bono services and direct services accordingly.

PILCH undertakes significant direct casework itself through the use of large teams of volunteer lawyers attending outreach clinics for elderly people and people experiencing homelessness. It also carries out important law reform and policy work on access to justice issues.

Support of the pro bono referral schemes that PILCH operates will ensure that there is consistency and appropriate direction of pro bono legal services in a manner that targets unmet legal need and access to justice.

(iv) Government lawyers

PILCH recommends that the government establish a scheme to enable and encourage the participation of lawyers employed by government agencies and legal services, such as the Commonwealth Attorney-General's Department, the State and Territory Departments of Justice, the Australian Government Solicitor and the State and Territory Government Solicitors, in the provision of pro bono legal services.

Recommendation No. 16:
The Federal Government should encourage and facilitate the provision of pro bono legal services by:

- reinforcing and strengthening pro bono targets in government legal services contracts and tendering;
- enacting legislation that abrogates the indemnity principle, to the extent necessary, to ensure that litigation costs can be awarded and recovered in pro bono cases;
- addressing barriers to pro bono legal service delivery that are entrenched in State regime government practising certificates and professional indemnity insurance;
- supporting organisations, such as PILCH, which promote and facilitate pro bono legal assistance; and,
- establishing a scheme to enable and encourage the participation of government lawyers in pro bono.

(c) *Legal costs in public interest litigation*

63. In its role as a pro bono referral service for public interest matters, PILCH has observed that many meritorious public interest matters are not ultimately pursued

because of the risk of an adverse costs order. In this way, the costs regime in Australia acts as a disincentive to public interest litigation, particularly for marginalised and disadvantaged people. This is especially the case where the matter involves an unresolved area of law, in the nature of a test case, such that legal advisors are not able to advise with any degree of certainty the likely outcome of the litigation. Such uncertainty increases the risk of an adverse costs order and therefore reduces the likelihood that a disadvantaged or marginalised applicant will pursue the important test case.

64. The Victorian Law Reform Commission, in its Civil Justice Review Report, considered that the risk of adverse costs orders was a significant deterrent to public interest litigation and concluded:

> [t]he Commission believes that there should be express provision for courts to make orders protecting public interest litigants from adverse costs in appropriate cases. They could include orders made at the outset of the litigation. The fact that a litigant may have a pecuniary or other personal interest in the outcome of the proceeding should not preclude the court from determining that the proceedings are in the public interest.[31]

Similarly, the Australian Law Reform Commission has recommended that 'if private citizens are to be able to [initiate public interest litigation], any unnecessary barriers erected by the law of costs should be removed'[32].

65. Below are three case studies of matters where the risk of an adverse costs order acted as a disincentive to litigants pursuing meritorious public interest litigation.

Case Study E: Tampa Case

PILCH referred the Tampa[33] matter and undertook much of the preparatory work for the proceedings. Since the appropriate applicants (the asylum seekers) could not be contacted, PILCH spent considerable time attempting to identify an alternative applicant to bring the claim on behalf of the asylum seekers. PILCH had real difficulties locating an applicant that would be prepared to bring the claim because they were concerned about the costs exposure. Ultimately Liberty Victoria was prepared to institute proceedings as the applicant despite this risk. In making a 'no costs' order in this matter, Black CJ and French J of the Federal Court said '[t]his is a most unusual case. It involved matters of high public importance and raised questions concerning the liberty of individuals who were unable to take action on their own behalf to determine their rights'[34].

Case Study F: Acquired Brain Injury

PILCH is aware of a matter in which an elderly woman with an acquired

[31] Ibid at 676.

[32] Australian Law Reform Commission, *Costs Shifting – Who Pays for Litigation* (1995), 78.

[33] *Ruddock v Vardalis (No. 2)* (2001) 115 FCR 229.

[34] Ibid at para 29.

brain injury had a very strong discrimination and administrative law claim in respect of a failure to provide adequate medical treatment. Proceedings were not instituted by the person's guardian, appointed under the *Guardianship and Administration Act 1986* (Vic), because the guardian was concerned about his personal exposure to a costs order. Guardians appointed under the Act can be personally liable for costs in proceedings that they bring on behalf of a person with an impairment. This costs risk acts as a significant disincentive to meritorious claims being pursued on behalf of very vulnerable and disadvantaged persons.

Case Study G: The *Schou* Case

In the case of *Schou v The State of Victoria*,[35] the plaintiff, a single mother, made a complaint against her employer for indirect discrimination in contravention of section 9 of the *Equal Opportunity Act 1995* (Vic), in relation to her request to work from home to enable her to care for her ill son. The plaintiff succeeded at first instance but lost at the Court of Appeal. She was unable to make a special leave application to the High Court because of the significant risk of an adverse costs order. The decision of the Court of Appeal raised issues of importance for the development of the law in Victoria on indirect discrimination. Given that the majority and dissenting judgments in the Court of Appeal applied the High Court authority on indirect discrimination differently, it was a matter of considerable public interest that an application be made to the High Court to determine the issues of the *Schou* case.

66. These case studies demonstrate that reform of the costs regime is necessary to ensure that impecuniosity is not a bar to the vindication of peoples' rights or the pursuit of meritorious claims in the public interest.

67. Whilst the courts retain discretion as to costs under Australian law, the general costs rule in civil proceedings is that costs follow the event. This means that the successful party can expect a costs award in his or her favour. Although Australia does not have any specific public interest costs regime, some courts have been prepared to make orders protecting public interest litigants against adverse costs orders.

68. In England and Wales, courts have developed specific rules for the granting of a 'protective costs order' (**PCO**). The leading decision is *R (Corner House Research) v Secretary for State for Trade and Industry*[36] (***Corner House***).

69. A PCO is a court order that protects a party to a proceeding from an adverse costs outcome. PCOs may include orders that:

- a party will not be exposed to an order for costs if it loses at trial;

[35] [2004] VSCA 71 (30 April 2004)

[36] [2005] 1 WLR 2600.

- the amount of costs that a party will be required to pay if it loses at trial will be capped at a certain amount; or,
- there will be no order for costs whatever the outcome of the trial.

70. Whilst the High Court has confirmed courts' jurisdiction to make orders in the nature of PCOs, such orders are rare in Australia and case law provides little guidance on what will constitute appropriate circumstances for making a protective costs order. Therefore, there is a need for law reform to:

- confirm the courts' jurisdiction to make PCOs and thereby overcome any reluctance to make such orders due to concerns about 'judicial law making'; and,
- clarify what factors are relevant to the discretion to make a PCO in public interest matters.

71. PILCH proposes that courts be specifically conferred with power to make PCOs in relation to 'public interest matters', by amendment to the relevant empowering legislation.[37]

72. Such amendments would empower the relevant courts to make a PCO in a proceeding at any time prior to judgment. The court would be empowered to make orders (on such terms and conditions as the court deems fit) that:

- a specified party will not be liable for costs, whether or not it is successful;
- one party's costs will be paid in whole or part by the other, regardless of the outcome of the proceeding; or,
- the amount of costs for which a specified party may be liable will be capped.

73. PILCH believes that the conferral of power on the courts to make PCOs would significantly improve access to justice for marginalised and disadvantaged Australians, and is necessary to promote and fulfil the right to a fair hearing in article 14(1) of the *International Covenant on Civil and Political Rights*. In essence, the right to a fair hearing requires a party to be able to present his or her case and evidence to the court under conditions that do not place him or her at a substantial disadvantage when compared with the other party.

74. The PCO amendment would not fetter the court's discretion to make orders as to the costs in a proceeding but would empower the court and guide the exercise of its discretion. In order to guard against misuse the PCO amendment should prescribe matters that the court must take into account when considering making a PCO. For instance, the amendment could enable the court to consider the nature and extent of any private or pecuniary interest that the applicant may have in the outcome of the proceeding, so that matters that do not have implications for a broader group will be unlikely to attract a PCO.

[37] For instance, PILCH proposes that the conferral of power on the Federal Courts be effected by amendment to each of the *Judiciary Act 1903* (Cth), the *Federal Court Act 1976* (Cth), and the *Federal Magistrates Act 1999* (Cth).

Recommendation No. 17:
Courts should be specifically empowered to make protective costs orders, through an amendment to the courts' relevant empowering legislation.

6.3 Litigants Imposing Disproportionate Costs[38]

75. In its report, the Taskforce examined different litigants who impose a disproportionate cost on the justice system, including vexatious litigants, SRLs, and mega-litigants. PILCH address access to justice for SRLs and their impact on the court system in section 6.1 of this submission. This section addresses parties that engage in strategic litigation against public participation' (**SLAPP**): that is, parties who issue SLAPP writs.

76. PILCH is concerned about an emerging practice in Australia of large corporations using litigation as a strategic means of suppressing adverse public debate, commentary and protest on issues of public importance. The increasing trend toward litigation of this kind led to the introduction of the terms 'strategic litigation against public participation' and 'SLAPP writ'[39].

77. An objective of the SLAPP writ is to engage the defendants in long and costly litigation, so as to distract and discourage them from further criticism or protest activities. Faced with such litigation, or the threat of litigation, community members involved in public debate, commentary or protest are often intimidated and withdraw from public debate for fear of the prohibitive costs and uncertainty of litigation which can drag on for years. By these means, SLAPP writs succeed in stifling criticism, and in so doing, impact negatively on public debate and participation. This in turn undermines the fundamental principles of democracy, access to justice and the rule of law.

78. Importantly, SLAPP writs often involve long and costly legal battles that tie up court resources dealing with questionable legal claims brought for the purpose of furthering the complainants' strategic objectives of suppressing public participation. The costs of this exercise are borne by the parties and the justice system, and therefore Australian tax-payers.

79. PILCH proposes the introduction of measures that would discourage the use of SLAPP writs and thereby reduce the incidence, length and cost of such litigation. Below are case studies where SLAPP writs, or the threat of legal action, have effectively suppressed public interest activities and communications. The examples illustrate the need to protect public participation.

Case Study H: Defamation Claim against Water Activists

A defamation action was brought by Frank De Stefano, chairperson of Barwon Water, against the Bannockburn Yellow Gum Action Group. Mr De Stefano sued the Action Group over their release of bumper stickers that read 'Barwon Water – Frankly Foul'. The Action Group were drawing attention to Barwon Water's `proposal to turn local woodland into a sewerage farm'. The defamation action had a major effect of intimidating the

[38] Access to Justice Taskforce Report, above note 1, at 117.

[39] The acronym was coined by American sociologists Pring and Canan.

community and removing their voice. Those defendants who were unable to secure pro bono assistance incurred significant legal costs.[40]

Case Study I: Defamation Threats against Property Developer

A defamation writ issued was by a property developer against an architecture lecturer for comments the lecturer made in *The Age* about the developer's to construction of a casino.[41] The lecturer found himself without legal support from the paper or his university, and eventually settled with an apology for an inference that may have been drawn from his comments, as they were reported. The threat of litigation in that case was said to have stifled public debate by a qualified commentator and the media about a matter of significant public interest and importance.

Case Study J: Gunns litigation (Victoria)

Gunns Limited, a Tasmanian sawmiller and hardware retailer, is Australia's biggest woodchip exporter. In 2004, Gunns lodged a writ in the Supreme Court of Victoria seeking injunctions and damages of $6.36 million against 20 Tasmanian environmentalists and groups. The 216 page complex writ claimed that the defendants engaged in a campaign against Gunns that amounted to a conspiracy to injure Gunns by unlawful means, and interference with Gunns' trade and business by unlawful means. PILCH was approached by 13 defendants for pro bono assistance and referred eight of them.

After two years of litigation, the Statement of Claim had been struck out three times and Gunns then re-pleaded and dropped almost half of the original claims and six defendants from the case. After a further two years of interlocutories with two hearings and an appeal in relation to discovery,[42] settlements were reached with three defendants – two involving no damages and both sides bearing their own costs and one with the defendant paying a 'small fraction' of what was originally sought but settling because the defendant wanted to 'stop haemorrhaging money' to his lawyers.[43] In April 2009 a further five defendants exited the case with Gunns paying their costs. Proceedings are still on foot regarding seven defendants.[44] The case has cost the defendants many millions to defend and has placed a significant burden on court resources.[45]

80. Other recent examples include:

- a case in Victoria where a dairy company took action against an organic food activist and the media, after the food activist had questioned the company's claims that its products were organic;

[40] Brian Walters, *Slapping on the Writs: Defamation, Developers and Community Activism* (2003) 14 -18; Donald, B, "Defamation Action Against Public Interest Debate" (Paper delivered to the Free Speech Committee of Victoria, 22nd April 1999).

[41] Walters, ibid at 28-31.

[42] Gunns v Marr & Ors [2008] VSC 464.

[43] The statement from the second defendant is at: http://www.wilderness.org.au/articles/law-discharged-from-gunns-case

[44] *Gunns Ltd v Marr* [2005] VSC 251; *Gunns Ltd v Marr (No. 2)* [2006] VSC 329; *Gunns Ltd v Marr (No. 3)* [2006] VSC 386; *Gunns Ltd v Marr (No. 4)* [2007] VSC 91

[45] From Dr Greg Ogle *Gunning for Change: The Need for Public Interest Law Reform* The Wilderness society Dec 2005

- the threat of legal action directed by Yarra Trams in 2003 against the Public Transport Users' Association, which related to a leaflet criticising the removal of seats from tram services[46]; and
- numerous threats received by the Consumer Action Law Centre in relation to its media releases exposing instances of misleading or deceptive conduct, unconscionable conduct, and other sharp practices by businesses including lenders, debt collectors, retailers and franchisors.

81. PILCH proposes that protection against SLAPP writs should be achieved by the introduction of uniform federal, state and territory legislation that is directed at discouraging and ultimately reducing litigation that would constrain public participation. PILCH contends that such legislation should:

- establish legislative recognition of a right to engage in public participation;
- confer on courts the power to award damages and costs against plaintiffs who issue proceedings for the improper purpose of discouraging public participation;
- provide for the dismissal of proceedings where the underlying alleged conduct constitutes public participation; and,
- allow parties to apply for a declaration that their conduct constitutes public participation before legal proceedings are brought against them.[47]

82. In the United States, 'anti-SLAPP' laws have been passed in some states to ban such legal action. For example, in California, section 425.16 of the Code of Civil Procedure provides a judge with the ability to dismiss a suit against a member of the public at the very beginning of the suit where the proceeding arises from a person exercising their right of petition or free speech in connection with a public issue.[48] The company that filed the SLAPP writ is then required to pay the defence costs of the person served with the writ.

Recommendation No. 18:
The Federal Government should introduce legislation that would discourage the use of strategic litigation against public participation writs and encourage public participation.

7. Cost Recovery

7.1 Party Costs

83. In its Report, the Access to Justice Taskforce acknowledged that parties to a civil dispute have an almost exclusive interest in its outcome. However, the justice system as a whole

[46] See Brian Walters, "Suing into Submission: Using Litigation to Quell Dissent", (Speech to Castan Centre for Human Rights Law, 9 August, 2005).

[47] PILCH has prepared a draft Bill for an Act to Protect Public Participation.

[48] Anti-Slap Resource Centre, http://www.thefirstamendment.org/antislappresourcecenter.html

represents a mix of public and private interests.[49] The Report examines the access to justice implications of shifting certain costs of the justice system from government to the users of that system. In so doing, it argues that greater exposure to the real cost of justice would encourage earlier, and alternative, dispute resolution.

84. Whilst PILCH acknowledges these observations, particularly as they apply to the majority of costly (commercial) hearings, it endorses findings in the Report that certain access to justice considerations militate against cost recovery in certain circumstances.[50] Accordingly, PILCH supports existing provisions for court fee exemptions and waivers.[51]

85. In an effort to reduce the costs of litigation, where one party is a Commonwealth Department, PILCH recommends that they should lead by example and pay the higher (and appropriate) fees applicable to corporations.

86. PILCH supports Recommendation 9.1; that is, the Attorney-General should initiate a thorough examination by the Standing Committee of Attorneys-General (SCAG) of issues and options for funding aspects of the justice system.[52] In particular, PILCH encourages the proposed SCAG review to examine issues surrounding the tax deductibility of legal costs, noting this is a further example of cost-shifting by commercial litigants.

Recommendation No. 19:
Commonwealth departments should pay the legal fees applicable to corporations.

Recommendation No. 20:
The Standing Committee of Attorney Generals should examine the tax deductibility of legal costs.

7.2 Transparency of Legal Fees

87. PILCH supports discussion in the Report on requiring litigation parties to disclose litigation budgets, with a view to encouraging earlier resolution of disputes, greater transparency and proportionality. PILCH recommends that pro bono parties should be entitled to declare and recover the effective cost of pro bono contributions under such a scheme.

Recommendation No. 21:
Pro bono parties should be entitled to declare and recover the effective cost of pro bono contributions under the proposed litigation budget disclosure scheme.

[49] Access to Justice Taskforce Report, above note 1, at 44, 49.

[50] Ibid at 45-48, especially Table 3.4.

[51] Ibid at 46.

[52] Ibid at 123.

8. Legal Assistance

8.1 National Coordination of Legal Assistance Services

88. Key to the reforms outlined in the Taskforce's Report is the establishment of a national coordination group to facilitate strategic decision-making across the legal assistance system in Australia.[53] That group would be responsible for, *inter alia*, developing strategies for promoting early intervention, reviewing legal assistance services nationally, and identifying options for improving the efficiency and effectiveness of service delivery for vulnerable groups.[54]

89. PILCH strongly endorses this initiative, as it has already witnessed first-hand the benefits that can be derived from collaborative partnerships of this kind. The Victorian Legal Assistance Forum (**VLAF**) (of which PILCH is member) is currently reviewing the efficiency and effectiveness of referral pathways and service delivery for vulnerable groups (eg: prisoners, culturally and linguistically diverse communities) in Victoria. While the Forum is an ongoing initiative, already improvements have been made to referral pathways and service delivery. PILCH urges the national coordination group to regularly share information and consult with state forums, such as the VLAF, in order to maximise its effectiveness and ensure best practice models are endorsed nation wide.

8.2 Early Intervention

90. The Taskforce's Report emphasises the benefits of early intervention and confirms what legal assistance providers, including PILCH, have long advocated: that access to effective legal assistance at an early stage can help to resolve legal problems before they escalate or compound and end up in court. In this regard, the Taskforce rightly acknowledges the significant role that CLCs and LACs play in providing early intervention services.[55] For instance, the Taskforce notes that the early provision of legal services, including by CLCs and LACs, can be a relatively inexpensive and efficient means of avoiding or quickly resolving disputes and preventing them from escalating.[56] Their work in meeting the legal needs of marginalised and disadvantaged people is essential to the smooth functioning of the Australian justice system.

91. The Taskforce Report encourages the adoption of measures to promote early intervention in legal matters, as a means of facilitating access to justice.[57] It also urges the Commonwealth to 'negotiate a National Partnership Agreement for legal aid that gives greater priority to intervening early to help prevent legal problems from escalating, building knowledge and respect for the law and resilience in dealing with legal issues'[58].

[53] Ibid at 139-141.

[54] Ibid at 140.

[55] Ibid at 142-143.

[56] Ibid at 36, 39.

[57] Ibid at 141-144.

[58] Ibid at 144.

92. PILCH supports a greater emphasis on efforts to resolve disputes outside courts and at an early stage of proceedings. It is deeply concerned, however, that the Taskforce's Report fails to address the need to adequately resource and fund services that can facilitate early intervention. Of particular concern to PILCH is the Report's general silence on the measures required to financially and otherwise support the legal aid and pro bono sectors.

(a) *Legal Aid Funding and Guidelines*

93. In recent years, there have been significant funding cuts to LACs and a commensurate narrowing of guidelines for the provision of legal aid, particularly in the areas of civil, family and migration law. This has significantly increased demand for services from CLCs and pro bono legal services. For instance, since legal aid funding for family law matters was further restricted, PILCH has had an 85% increase in referrals related specifically to family law matters.[59] Regrettably, PILCH's member firms are unable to meet the demand for assistance in these matters. Furthermore, pro bono assistance does not extend to family law property settlement matters, meaning that individuals are often left to represent themselves. This situation is particularly inappropriate in situations of family violence.

94. In addition to the increasing unmet legal need, legal aid funding cuts and the narrowing of relevant guidelines has resulted in less early intervention in legal proceedings with negative consequences for access to justice. PILCH submits that, in order to ensure effective access to justice, including through early intervention, the Federal Government should:

- increase legal aid funding, particularly in civil, family and migration matters;
- establish a national means test for legal aid applications that is less restrictive than the current Victorian regime; and,
- remove restrictions on federal legal aid funding so that it is made available in state and territory legal matters.

(b) *Funding for Community Legal Centres*

95. CLCs play a critical role in helping individuals to access justice, including through early intervention. Notwithstanding, as in the case of LACs, government funding of CLCs has decreased significantly in recent years. This has brought further pressure to bear on CLCs, which already work under significant resource and funding constraints.[60] Indeed, owing to overwhelming demand on their limited resources, CLCs have a high turn away rate. At the same time as funding has dried up, CLCs have experienced an influx in demand for their services,[61] which is only likely to increase.

[59] Comparisons were made of inquiry and referral intake in this area for the period 19/6/06-19/1/08 and 19/2/08-6/11/09.

[60] See generally Povey *et al.*, above note 5, at 47-54.

[61] See Hugh de Krester, Federation of Community Legal Centres (Victoria), *Briefing Notes – Australian Access to Justice* (2008).

96. In order to enable CLCs to effectively meet unmet community need for legal assistance, especially at the early stages of matters, and to facilitate access to justice, PILCH submits that the Federal Government should increase funding to CLCs. PILCH considers that CLCs should be allowed to operate on a needs-based model, with the abolition of the current policy of quarantining federal funding from state and territory matters.

Recommendation No. 22:
The Federal Government should adopt the Taskforce's recommendation to establish a national co-ordination group to facilitate strategic decision-making across the legal assistance system. This group should engage in information sharing and consultation with equivalent state and territory groups.

Recommendation No. 23:
The Federal Government should adopt the Taskforce's recommendation to prioritise prevention and early intervention services.

Recommendation No. 24:
The Federal Government should:

- increase legal aid funding, particularly for civil, family and migration matters;
- broaden legal aid guidelines;
- establish a national civil legal aid scheme;
- introduce a national means test for civil aid that is less restrictive than the current Victorian regime; and,
- remove restrictions on federal legal aid funding so that it is made available in state and territory legal aid matters.

Recommendation No. 25:
The Federal Government should increase the core funding of CLCs.

8.3 Pro Bono Legal Services

97. The Taskforce's Report acknowledged the significant and effective contribution to the community made by the pro bono legal sector, including private lawyers undertaking pro bono legal work.[62] PILCH agrees that private lawyers undertaking pro bono legal work and pro bono legal services, more generally, have long played an integral role in securing human rights and access to justice in Australia. This is especially true with respect to marginalised and disadvantaged individuals.

98. PILCH holds the strong view that pro bono is no substitute for an adequately funded Legal Aid and CLC sector. In this regard, PILCH refers to its discussion regarding the

[62] Access to Justice Taskforce Report, above note 1, at 52, 151.

importance of securing and encouraging pro bono legal assistance in section 6.2(b) of this submission.

8.4 Duty Lawyers

99. The Taskforce's Report acknowledges the existing benefits of duty lawyer services in criminal jurisdictions and family law. In the context of civil law services, it recommends that the Attorney-General's Department work with LACs to examine the benefits of 'locating duty lawyer/advice type services at courts and tribunals where appropriate'[63].

100. PILCH has long recognised the benefits of the duty lawyer services provided by LACs, not only in criminal and family law matters but also in other matters such as residential tenancy, social security, and judgement debt matters. PILCH strongly supports the Taskforce's recommendations, in particular in extending such services to civil law matters.

101. In PILCH's view, greater assistance could be provided to SRLs and other persons accessing courts, and the operation of the judicial system could be improved if duty lawyer services were to be extended to all courts. PILCH's strongly emphasises the need to ensure that the expansion of duty lawyer schemes is accompanied by adequate funding to referee legal services to ensure the effective operation of those duty lawyer services.

Recommendation No. 26:
The Federal Government should expand the Duty Lawyer scheme to all courts and ensure adequate funding for its effective operation.

8.5 Legal Assistance in Regional, Rural and Remote Areas

102. The Taskforce's Report notes that accessing (publicly or privately funded) legal services is becoming increasingly difficult in RRR areas in Australia.[64] Certainly, in PILCH's experience, the ability of persons living in rural, regional and remote parts of Australia to access legal representation is more difficult than persons living in metropolitan areas.[65] Reasons for this include the:

- fewer number of CLCs and LACs in RRR areas;
- greater likelihood of conflicts of interest arising;
- time, travel and accommodation costs associated with metropolitan services assisting persons in RRR areas; and,
- difficulties that RRR CLCs and private firms have in retaining lawyers.

103. The Taskforce recommends that the Attorney-General's Department should work with legal assistance service providers to explore options for improving access to legal assistance in RRR areas. PILCH commends this recommendation and, in so doing, encourages the Department to:

[63] Ibid at 145.

[64] Ibid at 146.

[65] See Povey *et al*., above note 5, at 20.

- investigate increasing legal aid funding for more outreach services in RRR areas;
- increase funding for wages for community lawyers in RRR areas to enable them to attract and retain lawyers;
- offer university fees assistance to law students as an incentive to practice outside the metropolitan area; and,
- examine different ways to support pro bono work in RRR areas.

Recommendation No. 27:
The Federal Government should improve access to legal assistance in RRR areas, including by examining the feasibility of:

- increasing legal aid funding for more outreach services in RRR areas;
- increasing funding for wages for community legal centres in RRR areas;
- providing HECs assistance to law graduates as an incentive to practice outside the metropolitan area; and,
- examining ways to support pro bono work being undertaken in these areas.

Annexure 1

See **attached** PILCH submission to the Senate Standing Committee on Legal and Constitutional Affairs on its inquiry into access to justice